

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 28, 2020, because she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

FACTUAL HISTORY

On March 4, 2019 appellant, then a 48-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained hand and elbow injuries due to factors of her federal employment. In a narrative statement dated February 13, 2019, she explained that she had worked for the employing establishment as a mail carrier for the past 4½ years, performing duties, which required repetitive gripping and grasping of mail, as well as lifting trays, bundles of mail, and parcels up to 70 pounds, 8 to 10 hours per day. OWCP accepted the claim for bilateral carpal tunnel syndrome, right ulnar nerve forearm injury, and bilateral elbow medial and lateral epicondylitis. It paid appellant wage-loss compensation on the supplemental rolls as of May 11, 2019, and on the periodic rolls as of February 2, 2020.

On November 20, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. William P. Curran, Jr., an orthopedic surgeon, for a second opinion evaluation regarding the status of appellant's accepted work-related conditions.³

In a November 21, 2019 report, Dr. Karl T. Nguyen, a Board-certified plastic surgeon and treating physician, noted that appellant's symptoms of ulnar nerve entrapment at the medial right elbow resolved after several months of conservative management. He noted that the posterior right elbow pain persisted with any lifting. Dr. Nguyen indicated that, since the entrapment symptoms had resolved, surgery to relieve the ulnar nerve at the right elbow was no longer necessary. He explained that the persistent posterior right elbow pain may be due to epicondylitis *versus* distal tricep tendinitis, and these two diagnoses were not amenable to surgery. Dr. Nguyen recommended conservative management with physical therapy, rest, cool compresses, and nonsteroidal anti-inflammatory drugs (NSAIDs), and also advised that steroid injections would be better choices for the nonoperative diagnoses of epicondylitis and tendinitis. He noted that a second opinion from an elbow orthopedic specialist could provide further clarity regarding appellant's condition.

In a December 9, 2019 report, Dr. Sidney H. Levine, an orthopedic surgeon and appellant's treating physician, diagnosed upper extremity overuse syndrome and bilateral elbow medial epicondylitis. He opined that appellant became symptomatic as a result of repetitive trauma associated with her work activities. Dr. Levine recommended physical therapy and ultrasound-guided injection of the right elbow. He noted that, if this produced positive results, she should also be provided this treatment for the left elbow.

³ OWCP requested that the second opinion physician confirm the diagnosed conditions, clarify the extent and duration of disability, and review appellant's treatment plan.

In a report dated January 6, 2020, Dr. Curran, OWCP's second opinion physician, noted appellant's history of injury and treatment. He examined appellant and found palpable tenderness over the right lateral epicondyle and common extensor tendon, and palpable tenderness of the left lateral epicondyle and common extensor tendon as well as the left forearm, with no swelling or deformity of the either elbow. Dr. Curran provided range of motion (ROM) measurements for the elbows and wrists. He noted that a February 15, 2019 magnetic resonance imaging (MRI) scan of appellant's wrists and elbows revealed bilateral cubital syndrome; bilateral lateral epicondylitis; tear of the right common extensor tendon of right elbow; bilateral carpal tunnel syndrome; tears of the bilateral scapholunate ligaments; and bilateral osteoarthritis of the wrists. Dr. Curran indicated that periods of temporary total disability commenced March 14, 2019 and ceased on January 6, 2020. He found no preexisting disability. Dr. Curran explained that, while appellant had subjective complaints of residuals from her work-related injuries, his physical examination failed to yield any objective findings to substantiate her current subjective complaints, noting that a positive Phalen's test was subjective and not objective.

Dr. Curran opined that authorization for repair/revision of the wrist joint/bursa was not recommended. He recommended home exercises; bilateral wrist and hand splints, as needed; and use of over-the-counter anti-inflammatory medications and analgesics. Dr. Curran found that appellant had reached maximum medical improvement (MMI) and was capable of returning to work with restrictions. He completed a work capacity evaluation (Form OWCP-5c), dated January 7, 2020, and provided permanent sedentary work restrictions including: no more than four hours of twisting of the wrists; no more than six hours of repetitive movements of the elbows; no more than four hours of pushing, pulling or lifting of no more than five pounds; no climbing; and five-minute breaks every hour.

In a January 16, 2020 report, Dr. Levine noted that he had reexamined appellant. He related that, when she drove more than 20 minutes, she developed numbness in her fingers. Dr. Levine examined the upper extremities and found tenderness over the ulnar nerve in the cubital tunnel on the right, tenderness over the medial and lateral epicondyles on the right, trace tenderness over the lateral epicondyle on the left, and pain with wrist and finger extension against resistance on the right. He provided a detailed physical examination, which noted a positive Tinel sign, negative percussion over the ulnar nerves in the cubital tunnels bilaterally, no pain associated with wrist extension against resistance bilaterally, no evidence of volar ganglion over the right wrist, full and equal ROM of both wrists, and sensation intact throughout the upper extremities. Dr. Levine provided Jamar grip findings, girth findings, and results of x-rays for both extremities. He noted that there was no evidence of fractures, soft tissue calcification, or bony abnormalities, and a normal x-ray examination of the elbows and wrists. Dr. Levine diagnosed overuse syndrome, upper extremities, and medial epicondylitis, right and left elbow. He recommended that appellant continue her physical therapy and be provided with the opportunity to undergo ultrasound guided injection of the right elbow. Dr. Levine noted that, if she had good results, then she should be provided the opportunity to undergo a similar injection in the left elbow. He opined that there was a reasonable medical certainty that appellant became symptomatic due to repetitive trauma associated with her work activities. Dr. Levine noted that appellant was temporarily totally disabled from work. He enclosed an attending physician's report (Form CA-20) dated December 16, 2019, which noted that appellant would be totally disabled from work through January 15, 2020.

In letters dated January 17 and 27, 2020, OWCP requested that Dr. Levine review Dr. Curran's report and provide an opinion regarding appellant's conditions.

In a February 4, 2020 report, Dr. Levine noted his review of Dr. Curran's report and his reexamination of appellant. He noted that she had tenderness over the superior aspect of the lateral epicondyle of the right elbow, as well as tenderness over the medial epicondyle. Dr. Levine again recommended ultrasound-guided injection for the medial epicondylitis, initially as it related to the right elbow, and if there was a positive response, a similar injection to the lateral epicondyle. He opined that, "[a]t this time she is disabled from carrying out her regular work activities." In a January 16, 2020 Form CA-20, Dr. Levine noted that appellant was still awaiting an injection to the right elbow and placed her off work for three months. In a February 4, 2020 Form CA-20, he related that appellant was temporarily totally disabled from work as she was still awaiting a right elbow injection.

In a letter dated February 26, 2020, OWCP requested that the employing establishment offer appellant a job within Dr. Curran's restrictions.

On March 5, 2020 the employing establishment offered appellant a modified city carrier position. The duties of the position included: up to one hour of case routing; up to 2 hours of delivering route on the curb side; and up to 1 hour of casing down route (as needed). The physical requirements of the position involved up to 4 hours of lifting, pushing and pulling (5 pounds); simple grasping and fine manipulation; up to 4 hours of sitting (intermittently), standing (intermittently), and reaching above the shoulder; up to 2 hours of bending, stooping, or twisting (intermittently); up to 2 hours of walking; up to 3 hours of driving; and up to 30 minutes of kneeling. The regular work hours for the position were 7:50 a.m. to 11:50 a.m., with scheduled days off on Sunday, rotating. It was noted that appellant could manage her duties to work safely within her restrictions, would be given assistance with items over her weight limitations, and would take a 10-minute break every hour and wear wrist splints as needed.

Appellant refused the job offer on March 5, 2020, based upon her doctor's restrictions.

On March 9, 2020 OWCP contacted the employing establishment and confirmed that the job remained available and that it was "not a temporary offer."

By letters dated March 11 and 16, 2020, OWCP advised appellant that the modified city carrier position offered on March 5, 2020 was suitable and in accordance with the medical restrictions provided by Dr. Curran in his January 7, 2020 report. It found the weight of the medical opinion evidence rested with Dr. Curran regarding appellant's work restrictions. OWCP notified appellant that, if she failed to report to work or failed to demonstrate that the failure was justified, her compensation for wage loss or entitlement to a schedule award would be terminated pursuant to 5 U.S.C. § 8106(c)(2). It afforded her 30 days to respond.

On March 13, 2020 the employing establishment advised appellant that the most recent medical report dated January 7, 2020 set forth restrictions of lifting, pushing, and pulling, up to five pounds, 4 hours per day; repetitive movements of the wrists, up to 4 hours per day; elbows up to 6 hours per day; twisting up to 4 hours per day; no climbing; and 10-minute breaks every hour. The employing establishment noted that she was instructed not to work outside her medical

restrictions and must take the required breaks. Appellant was further advised to notify the employing establishment if this was not her current medical report, or if other medical evidence should be considered with regard to her limited-duty assignment.

A March 5, 2020 priority for assignment worksheet from the employing establishment noted that they were only able to find three hours of work for appellant.

A March 5, 2020 chart note from Dr. Levine indicated that appellant had persistent pain in both her hands, more pronounced in the left hand, and pain within her right elbow. Dr. Levine related that she also complained of pain in her hands if she drove for more than 20 minutes and that she developed tingling and numbness in all of her fingers. He examined appellant's right elbow and noted 3+ tenderness in the medial epicondyle, pain with wrist flexion against resistance, 2+ tenderness over triceps insertion, full ROM with full extension to 135 degrees of flexion; sensation intact to pinwheel and to touch, and Tinel's sign negative to percussion median nerve with the carpal tunnel. Dr. Levine opined that she remained disabled from work. He reiterated that appellant was awaiting ultrasound-guided steroid injection in the region of the medial epicondyle of her right elbow and he completed a Form CA-20 noting the same.

In a March 30, 2020 statement, appellant indicated that she could not accept the job offer because it involved doing "the same thing that caused my injuries in the 1st place." She indicated that she had to limit her driving to under 30 minutes, she could not hold anything in her right arm for more than 60 seconds before it locked up, her grasp in both hands was deteriorating, and she dropped items frequently. Appellant also noted that Dr. Curran did not mention grasping in his report and his handwritten notes were unreadable. She related that her physician had taken her off work pending an injection.

In an April 10, 2020 report, Dr. Levine noted that appellant persisted with right elbow and right upper extremity pain and that she was awaiting a steroid injection in the right elbow. He explained that she had difficulty driving for more than 20 minutes and, therefore, her driving should be restricted, followed by a 10-minute break from driving. Dr. Levine also indicated that appellant should have a lifting limit of five pounds and no repetitive gripping or power gripping or repetitive pushing or pulling.

On April 24, 2020 OWCP confirmed with the employing establishment that the job offer remained available.

By letter dated April 27, 2020, OWCP notified appellant that her reasons for refusing the position were not valid and that the medical evidence submitted was insufficient to support refusal, as it did not address whether she was capable of performing the offered position. It provided her 15 days to accept the position or have her entitlement to wage-loss compensation and schedule award benefits terminated. OWCP further advised appellant that the offered position remained available.

Dr. Levine completed a May 8, 2020 Form CA-20 and reiterated that appellant could not perform repeated gripping, grasping, pushing, pulling, and no power gripping. He noted that she was awaiting an injection to the right elbow.

On May 28, 2020 OWCP confirmed with the employing establishment that the limited-duty position remained available, and that appellant had not accepted the position or returned to work.

By decision May 28, 2020, OWCP terminated appellant's wage-loss compensation and entitlement to a schedule award, effective May 28, 2020, as she had refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2). It noted that she had not accepted the offered position or resumed work following its 15-day letter. OWCP determined that the opinion of Dr. Curran, as provided in his January 7, 2020 report, constituted the weight of the evidence and established that appellant could perform the duties of the offered position. It further noted that Dr. Levine based his medical opinion upon appellant's subjective complaints of pain and, as a result, had failed to provide a medical opinion on the issue of disability. OWCP determined that appellant's job refusal and failure to report to the offered position were not justified.

On June 8, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on September 18, 2020.

OWCP subsequently received a copy of the May 8, 2020 Form CA-20 from Dr. Levine, who restricted appellant to no repeated grasping, pinching, pulling or power gripping. Dr. Levine advised that she was awaiting an injection for the right elbow. He also submitted a June 19, 2020 Form CA-20, again noting that she was awaiting an injection for the right elbow.

In a June 19, 2020 progress note, Dr. Levine noted that he examined appellant. He noted that she was not working, utilized over-the-counter pain medication, and continued to have pain in the right elbow that increased with any attempts to grip, push, or pull. Dr. Levine indicated that appellant continued to wait for an ultrasound steroid injection to the right elbow for her persistent medial epicondylitis. He noted that she could carry out modified work activity, avoiding any repetitive gripping, power gripping, pushing, and/or pulling.

In a September 11, 2020 chart note, Dr. Levine noted that he examined appellant. He noted that she indicated that she had retired and was awaiting previously-recommended medical treatment to include a steroid injection to the medial aspect of her right elbow. Dr. Levine indicated that appellant had pain with any activities that required pushing, pulling, or gripping, and limited motion of her elbow. He opined that she was not capable of carrying out the work activities of a mail carrier, which requires activities of repetitive pushing, pulling, gripping, carrying/sorting mail, and carrying trays weighing up to 50 pounds. Should appellant attempt to return to her former type of work activities, this would only lead to further disability and the potential need for surgical treatment. Dr. Levine also completed a Form CA-20, noting appellant was still awaiting treatment for her right elbow.

By decision dated December 3, 2020, OWCP's hearing representative affirmed the May 28, 2020 decision.

LEGAL PRECEDENT

Under FECA,⁴ once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.⁵ Section 8106(c)(2) of FECA provides that a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by or secured for the employee is not entitled to compensation.⁶

Section 10.517 of FECA's implementing regulations provides that an employee who refuses or neglects to work after suitable work has been offered or secured by the employee, has the burden of proof to show that such refusal or failure to work was reasonable or justified.⁷ Pursuant to section 10.516, the employee shall be provided with the opportunity to make such showing before a determination is made with respect to termination of entitlement to compensation.⁸

To justify termination of compensation, OWCP must show that the work offered was suitable, that appellant was informed of the consequences of his or her refusal to accept such employment, and that he or she was allowed a reasonable period to accept or reject the position and submit evidence or provide reasons why the position is not suitable.⁹ Section 8106(c)(2) will be narrowly construed as it serves as a penalty provision, which may bar an employee's entitlement to compensation based on a refusal to accept a suitable offer of employment.¹⁰

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹¹ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹² When there exists opposing reports of virtually equal weight and rationale and the

⁴ *Supra* note 2.

⁵ *B.H.*, Docket No. 21-0366 (issued October 26, 2021); *M.S.*, Docket No. 20-0676 (issued May 6, 2021); *D.M.*, Docket No. 19-0686 (issued November 13, 2019); *L.L.*, Docket No. 17-1247 (issued April 12, 2018); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁶ *Supra* note 2 at § 8106(c)(2); *see also M.S., id.*; *M.J.*, Docket No. 18-0799 (issued December 3, 2018); *Geraldine Foster*, 54 ECAB 435 (2003).

⁷ 20 C.F.R. § 10.517.

⁸ *Id.* at § 10.516; *see M.S., supra* note 5; *Ronald M. Jones*, 52 ECAB 406 (2003).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4 (June 2013). *See also M.S., id.*; *R.A.*, Docket No. 19-0065 (issued May 14, 2019).

¹⁰ *M.S., id.*; *C.M.*, Docket No. 19-1160 (issued January 10, 2020); *see also Joan F. Burke*, 54 ECAB 406 (2003).

¹¹ 5 U.S.C. § 8123(a); *E.L.*, Docket No. 20-0944 (issued August 30, 2021); *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹² 20 C.F.R. § 10.321; *I.L.*, Docket No. 18-1399 (issued April 1, 2019); *R.C.*, 58 ECAB 238 (2006).

case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits and entitlement to a schedule award, effective May 28, 2020, for refusal of suitable work, pursuant to 5 U.S.C. § 8106(c)(2).

OWCP referred appellant for a second opinion evaluation with Dr. Curran. In his report dated January 6, 2020, Dr. Curran opined that appellant could return to modified work with a number of restrictions.

The employing establishment thereafter on March 5, 2020 offered appellant a modified city carrier position, which was purportedly within the restrictions provided by Dr. Curran. The duties of the position required up to one hour of case routing; up to two hours of delivering route on the curb side; and up to one hour of casing down route. The physical requirements of the position involved up to four hours of lifting, pushing and pulling (five pounds), simple grasping and fine manipulation; up to four hours of sitting (intermittently); standing (intermittently); and reaching above the shoulder; up to 2 hours bending, stooping, twisting, (intermittently); walking up to 2 hours; up to 3 hours of driving, and up to 30 minutes of kneeling.

In a February 4, 2020 report, appellant's treating physician, Dr. Levine, opined that appellant was disabled from carrying out her regular work activities. In a CA-20 of even date, he related that she was temporarily totally disabled from work. In his reports dated April 10 and May 8, 2020, Dr. Levine related that appellant could perform modified work, however that she could not perform repetitive gripping or power gripping or repetitive pushing or pulling. Since the modified job position included duties which would require repetitive gripping, pulling and pushing, the Board finds that there is a conflict in the medical opinion evidence regarding appellant's ability to perform the duties of the offered position.

Before terminating compensation, OWCP should have resolved the conflict in the medical opinion evidence by referring appellant to a third physician serving as an impartial medical specialist.¹⁴ As it failed to resolve the conflict of medical opinion evidence, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 28, 2020, for refusal of an offer of suitable work pursuant to 5 U.S.C. § 8106(c)(2).

¹³ V.S., Docket No. 19-1792 (issued August 4, 2020); *A.E.*, *supra* note 13; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁴ *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and entitlement to a schedule award, effective May 28, 2020.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 13, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board